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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

CAULDWELL-WINGATE COMPANY and POIRIER & McLANE, CORPORATION,

Petitioners, Defendants Below,

against

MARY E. PERSON, as Administratrix of the Goods, Chattels and Credits of WILLIAM S. PERSON, Deceased,

Respondent, Plaintiff Below,

PORT CHESTER ELECTRICAL CONSTRUCTION COMPANY,

Respondent, Defendant Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WARNER PYNE,
HERBERT S. GREENBERG,
Attorneys for Petitioners.

MONROE J. CAHN,
Of Counsel.

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Respondent, Defendant Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, corporations organized under the laws of the State of New York, pray this court for the issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit to review a decision of said court, dated the 14th day of March, 1951, which affirmed as against petitioners, and reversed and ordered

a new trial in respect of respondent, Port Chester Electrical Construction Corporation, a judgment of the United States District Court for the Southern District of New York, entered upon the verdict of a jury in plaintiff's favor in the sum of Ninety Thousand ($90,000) Dollars.

The Decisions Below

There have been two trials. Upon the first trial, plaintiff was non-suited at the end of plaintiff's case. Upon appeal, the Court of Appeals reversed and ordered a new trial (176 Fed. 2d, 237).

The opinion of the Court of Appeals on the appeal here involved (R., 619a) has not yet been reported.

Petitioner's petition for rehearing (R., 631a) was denied by the Court of Appeals on April 2nd, 1951.

Statement of the Matter Involved

The jurisdiction of this court is invoked under section 240-a of the Judicial Code, as amended, and rule 38 of this court.

This action was brought by respondent, Mary E. Person, as Administratrix of the Goods, Chattels, and Credits of William S. Person, deceased, hereinafter referred to as plaintiff, against the petitioners, ar respondent, Port Chester Electrical Construction Company, hereinafter referred to as the sub-contractor, to recover damages for the wrongful death of plaintiff's intestate, alleged to have been caused by defendants' negligence.

The case is an unusual one. It is unusual in the facts upon which the plaintiff sought to charge defendants with liability. It is unusual in that the trial judge submitted the case to the jury upon a single but erroneous theory,

which theory had been laid down by the Court of Appeals on the prior appeal. It is even a more unusual in that the Court of Appeals, while recognizing upon the appeal below that the theory of submission was erroneous and, therefore, reversed as to the sub-contractor, nevertheless affirmed as to petitioners upon an assumption of fact, which was not proved upon the trial. Upon this non-existent fact was based a theory not urged upon the trial nor submitted to the jury by the trial judge, and this deprived petitioners of their constitutional right to have a jury pass upon the question of fact upon which the affirmance was based. Moreover, the effect of the decision below has been to make petitioners wholly liable for the acts of their sub-contractor and at the same time to deprive petitioners of their remedies of indemnity and contribution from the sub-contractor which, having done the work which was claimed to have caused the death, was primarily responsible for the work.

These extraordinary circumstances appear from the facts recited below and the brief submitted herewith.

Petitioners were the general contractors under a contract with the United States Army Engineers for the construction of Camp Shanks in Rockland County, New York, between October 1942, and about August 1st, 1943 when the work was finally accepted by the Army (R., 92a). The sub-contractor had the sub-contract from petitioners for the installation of the outdoor, overhead electrical system, completing its work on May 15th, 1943 (R., 150).

After 1943, none of the defendants had anything whatever to do with the camp or its maintenance (R., 92a, 292a). The camp was used and maintained by the Army as a staging area for departing troops until August, 1946 when it was turned over to the Federal Housing Administration to provide homes for returning veterans (R., 242a).

Plaintiff's intestate was an electrical linesman, employed by James E. Smith Company, an electrical contracting firm (R., 16a-17a).

On August 6th, 1946, more than three (3) years after defendants had finished their work, in connection with performing electrical construction work required to make the camp ready for residence purposes, he was engaged in tapping in a 110 volt line from wires attached to street pole 1422 (R., 18a). For this purpose he had climbed the pole, and was electrocuted, apparently as the result of grasping the upper part of a guy wire which, allegedly, had become energized in consequence of improper contact between a "jumper" wire, connecting the high tension wires meeting at the pole, the jumper being carried around the pole, and the strain plate fastened on the pole to which the guy wire was attached (R., 19a).

Plaintiff's claim of negligence was that the proximity of the jumper to the strain plate was dangerous and should have been guarded against by carrying the jumper through a pin inserted on the top of the pole. Such a pin is known as a pole top pin.

Defendants established that Army engineers, who, under the main contract (R., 174a), had full and complete control of the work had expressly directed that no pole top pin be used (R., 190a, 194a, 197a, 199a, 201a, 205a, 220a, 233a). Accordingly, defendants claimed that, having followed the directions of the Army, they were absolved from liability unless the defect and its dangers (both of which were denied) were so patent to them as ordinary, prudent contractors that they should have refused to obey the orders.

The trial judge refused to accept the defendants' theory but, in obedience to the prior opinion of the Court of Appeals, submitted the case on a charge that if the installation was patently dangerous to *electrical engineers,* defendants were liable.

It is to be particularly noted that no question of fact as to defendants' acting as, or using, electrical engineers

on the job was submitted to the jury as a necessary, preliminary condition to liability. The rule laid down was absolute, irrespective of what services defendants used or what skill, knowledge or experience they had or did not have.

In its opinion below, the Court of Appeals acknowledged that the charge was erroneous, and that, under applicable local law, ordinarily, defendants could be held only to the standard of skill of an ordinary, prudent contractor. The court, therefore, held that since the record disclosed no proof that the sub-contractor employed an electrical engineer, as to it the charge was erroneous and ordered a new trial. But as to petitioners, the court below seized upon a casual statement of an employee, one Davies, to the effect that at the time of the trial, seven (7) years after his employment by petitioners, he regarded himself as an "electrical construction engineer". Upon this testimony, the court below concluded that at the time of the installation, seven years before, the employee was "an electrical engineer" and upon this unwarranted assumption thrust absolute and exclusive responsibility upon the petitioners for the work performed by their absolved sub-contractor, though neither this theory of liability or the fine distinction thereunder was ever presented or suggested to the jury.

This ruling brought into the case, the new, hitherto unsuggested contention that petitioners had employed an electrical engineer to supervise the work. No such contention was made by plaintiff during the trial nor was it suggested by the trial judge in his charge. The novelty of the suggestion is apparent from the fact that most of the testimony bearing upon the question, and upon which the finding was evidently based is not contained in the printed record. It has, therefore, been necessary to supply it to this court by way of an appendix hereto.

In their petition for rehearing (R., 631a), petitioners pointed out to the Court of Appeals that the said issue had not been litigated; that petitioners vigorously deny that they employed an electrical engineer to supervise the work; and that the absolute assumption of fact by the Court of Appeals was in excess of that court's jurisdiction; and, further, that, at the worst from petitioner's standpoint, a question of fact was involved which petitioners were constitutionally entitled to have submitted to a jury.

A further question is presented, that plaintiff failed to make out a *prima facie* case.

Though the method of attaching the jumper was the foundation of plaintiff's case, the evidence established that the jumper which allegedly caused the accident had not been installed by the sub-contractor.

Upon this point, the Court of Appeals said (R., 620a):

> "Upon this trial the defendants proved that the jumper which connected the two high tension wires, when it was originally installed, was not itself a separate piece of wire, as the evidence on the first trial showed, but was the continuation of one of the high tension wires, which, after passing through the clevis of one insulator bell, had been twisted on itself, and the free end carried around the pole, six to ten inches away from it, and made fast to the other high tension wire by a Burndy connector. In short, the original jumper had not been a separate wire, but the end of one of the high tension wires. The jury was justified in inferring from this substitution that the high tension wire, of which the jumper was formed, had sagged between the poles and had been pulled taut; and that the end had been cut off and a new jumper substituted, fastened at each end by a Burndy connector."

In view of the proof that the jumper installed by defendants was not on the pole at the time of the accident, there was a plain failure of proof by plaintiff, entitling defendants to a dismissal and certiorari is requested on that ground.

A further question is that the decision below is in conflict with controlling New York law on the issue of liability. Upon the first appeal, the Court of Appeals held that defendants could be liable for defects in the installation, despite the fact that they had turned it over to the Army more than three (3) years before, because it was an "inherently dangerous" instrumentality.

Since the trial but before the appeal below, in *Campo* v. *Scofield,* 301 N. Y. 468, the New York Court of Appeals decided that the doctrine of dangerous instrumentality is not applicable where the danger is open and obvious but only where it is hidden. Accordingly, the doctrine is not applicable at bar because the danger from the jumper, if, in fact, it was defective, particularly to an experienced linesman, such as plaintiff's intestate, was open and obvious.

Questions Presented

Accordingly, petitioners respectfully submit that the following questions should be reviewed by this court:

1. Did the decision of the Court of Appeals deprive petitioners of their constitutional right to a trial by jury under the Seventh Amendment to the Constitution?

2. Was the decision of the Court of Appeals beyond the jurisdiction of that court in that the court based its decision upon a finding of fact made by that court upon equivocal evidence and upon a theory not previously an issue in the case?

3. Should the complaint have been dismissed for failure of proof, it appearing that the jumper which caused the death of plaintiff's intestate was not the jumper installed by the sub-contractor?

4. Should the complaint have been dismissed because the danger from the jumper was open and obvious, and, therefore, under New York law, liability did not survive against petitioners three years after they had turned the camp over to the Army, which ever since had maintained it.

Petitioners respectfully submit that the foregoing questions involve important questions of federal law which the Court of Appeals had decided in conflict with applicable decisions of this court, and which are a departure from the accepted and usual course of judicial proceedings; and important questions of local law which the Court of Appeals has decided in conflict with applicable local decisions.

Accordingly, review on Writ of Certiorari is respectfully requested.

Dated: New York, May 3d, 1951.

Respectfully submitted,

WARNER PYNE,
HERBERT S. GREENBERG,
Attorneys for Petitioners.

MONROE J. CAHN,
Of Counsel.

PETITIONER'S BRIEF

We present the merits of the proposed questions *seriatim.*

POINT I

The decision of the Court of Appeals deprived petitioners of their constitutional right to a jury trial.

The single theory of liability upon which the case was sent to the jury was thus phrased by the trial judge (R., 324a):

> "* * * If you find that competent electrical engineers would have considered the method by which the jumper was attached to the pole by the defendants to have been not the safest rigging, you then must determine whether such engineers would have appraised the installation as being so patently dangerous as to be deemed improper.
>
> "* * * Would competent electrical engineers have anticipated that the jumper thus installed might have touched the strain plate and would they have anticipated that a linesman climbing the pole might have touched the guy wire thus energized? If you conclude that they would then you have patent danger. If you decide that competent electrical engineers would have foreseen these contingencies, then you must answer the question 'were the defendants negligent?' in the affirmative, notwithstanding that you may find that the defendants installed the jumper in that manner pursuant to the directions of the Army engineers."

The court's charge that the standard of test was the judgment of "competent electrical engineers" followed

the ruling by the Court of Appeals that such was the applicable test, upon the prior appeal (176 Fed. 2d 241):

> "Finally, the defendants argue that, since the work was done according to the plans and specifications of the War Department they may not be held liable provided they did the work as therein prescribed.* That is an issue on which we shall not pass now. It was a defence which the defendants had the burden of proving; the negative was no part of the plaintiff's case, and indeed the plans and specifications were not even put in evidence. If they had been, the defendants would have been obliged, not only to satisfy the jury that they required the rigging at 'Pole 1422' to be as it was, but that the specifications were not so patently dangerous that the competent electrical engineers would have thought them improper. These issues will be open on the new trial."
>
> **Hardie* v. *Boland,* 205 N. Y. 336;
> *Ryan* v. *Feeney & Sheehan Building Co.,* 239 N. Y. 43.

It is to be particularly noted that both in the above opinion and the charge that followed it the test of what "competent electrical engineers" would have anticipated and foreseen was laid down as an absolute, unqualified rule without regard to whether or not defendants in fact employed any electrical engineer on the job.

Upon the appeal below, the Court of Appeals acknowledged (R., 625a) that the charge did not accord with New York law as established by the two New York cases cited in its prior opinion, and, in consequence, reversed and ordered a new trial as to the sub-contractor.

However, as to petitioners, the judgment was affirmed on the ground (R., 626a) that as to them the charge was correct because petitioners had in fact employed an electrical engineer and therefore were properly subject to the standard of such "specialist".

(1) It is obvious that whether or not petitioners employed an electrical engineer would be a question of fact, unless such employment were conceded.

(2) It is further obvious that, if disputed, it would be necessary to submit such question of fact to a jury to satisfy petitioners' constitutional rights under the Seventh Amendment.

(3) It is further obvious that, if the fact of such employment were essential to petitioners' liability, they were entitled to reasonable notice of such issue and a full opportunity to litigate it.

Taking up the above points in their inverse order, it is clearly apparent that petitioners were given no notice of nor opportunity to litigate the issue of such employment for the simple reason that the question was never in the case until presented in the opinion below.

The case was not tried upon that theory nor was it submitted to the jury on that theory. Nor was that theory suggested in the opinion of Court of Appeals on the prior appeal.

We have already emphasized that the case was submitted on the theory that the standard of competent electrical engineers was absolute and unqualified, irrespective of whom defendants employed.

This was made clear not only by the charge itself with respect to the standard but as well by the charge that all defendants must be treated as a unit (R., 336a):

> "* * * your verdict must be against all defendants. You may not find for the plaintiff against any one or two defendants and find for the remaining defendant or defendants."

Since in the trial court, as we have shown, all defendants had been treated as a unit, it would seem that a new trial

should have been directed in favor of petitioners as well as the sub-contractor.

In distinguishing between the defendants, the Court of Appeals injected into the case, the new, previously unsuggested and wholly unlitigated theory that because petitioners had, in fact, utilized the services of an electrical engineer they were subject, under New York law, to exercise the skill of such specialist. No New York case so holding is cited by the court and we know of none.

Is it, therefore, clearly apparent that the Court of Appeals has disposed of the case upon a theory not presented in the trial court, based upon a foundation directly contrary to that adopted by the trial court.

The right to notice of, and opportunity to litigate, an issue is basic to the administration of justice.

If petitioners were subject to liability if they employed an electrical engineer, they were entitled to advance notice of that claim and the opportunity to meet it by proof.

Hormel v. *Helvering,* 312 U. S. 552, is here directly in point. Mr. Justice Black there said (p. 556):

> "Ordinarily an Appellate Court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there on issues upon which they have had no opportunity to introduce evidence."

The novelty and unexpected nature of the Court of Appeals' ruling is further manifest from the fact that much

of the testimony of Davies, whom the Court of Appeals held to be petitioners' electrical engineer, upon which, presumably (R., 626a) that finding was based, is not contained in the printed record below. Accordingly, it has become necessary for us to submit so much of it, not there printed, as bears upon this issue, as an appendix hereto.

Davies, called by plaintiff testified that, *at the time of trial,* his occupation was that of "electrical construction engineer". That testimony was given nearly seven years after he had left the contractor's employ (R., 55a-56a). Surely, this casual statement, elicited by way of introduction of the witness to the jury was not sufficient to establish absolutely, as matter of law, Davies' qualifications nearly seven (7) years before, especially since he explicity refused to say that he was even then (at the trial) an "electrical engineer" (Appendix, p. 18):

> "Q. Mr. Davies, you are an electrical engineer, is that correct? A. Electrical construction engineer. I will qualify that."

What he meant by "electrical construction engineer" did not appear; nor was there any proof of his education, training and experience prior to his employment by the contractor in 1943. It is clear, therefore, that plaintiff did not intend to establish his competence as an electrical engineer. There was even no showing that in 1943 he regarded himself as an electrical construction engineer. There was certainly no proof that he was, at any time, of the competence of Shaw (R., 150a) or Latzer (R., 273a).

His employment by the contractor for the job here involved was not as an electrical engineer but as "electrical superintendent" only (R., 55a).

There was no proof that the contractor considered him to be an electrical engineer or employed him as a specialist.

In this state of the record, we submit that there is no warrant for a finding that in 1943 Davies was an electrical engineer or the equivalent.

The reason for his employment by the contractor as electrical superintendent appears from the main contract. Under that contract, the contractor was charged with the duty of doing the work (Pl. Ex. 36, pp. 3-4):

> "* * * more specifically described in designs, drawings and specifications prepared for the same project by Tuttle, Seelye, Place and Raymond, Architect-Engineers";

and

> "in accordance with the drawings and specifications or instructions to be furnished hereafter by the contracting officer and subject in every detail to his supervision, direction and instructions."

and also (p. 5) to

> "advise and consult with the subcontractors in this project and shall direct and supervise their work subject to the provisions of Article VII; * * *"

Article VII (p. 18) provided:

> "The extent and character of the work to be done by the constructor (sic) shall be subject to the general supervision, direction, control and approval of the contracting officer to whom the constructor shall report and be responsible."

The foregoing establishes that no duty was cast upon the contractor to control or direct the work of the subcontractor, but that this was expressly reserved by the contracting officer. Nor was any duty cast upon the contractor to employ an electrical engineer.

There was, however, a duty cast upon the contractor to "direct and supervise" the work in the sense of seeing that it was executed in accordance with the Army's directions. In discharge of that obligation, the contractor necessarily employed men under Heintze, the chief engineer, in his words (R., 37a):

> "To see to it that the work was carried out in accordance with the plans and specifications and to see to it that the work of the subcontractors kept pace with the general construction."

For this purpose Davies was employed in connection with the electrical work.

He expressly disclaimed that it was his function to instruct the sub-contractor as to how the work was to be done or to inspect work for construction defects other than to see to it that the work generally conformed to the plans, specifications and directions of the Army (Appendix, pp. 13, 15).

There was no evidence that the work done by Davies required the knowledge, training or experience of an electrical engineer. Nor was there any evidence that his work could not have been done by one no more highly qualified than a competent electrical contractor, such as the subcontractor professed to be.

There was no proof or offer of testimony to show that Davies had any direct participation in the specific construction at Pole No. 1422 or that he was even aware of the Army's direction to omit a pole top pin.

There was no evidence that the extent of the supervision exercised by Davies was more extensive than was normally and properly exercised by a general contractor obligated to see to it that its sub-contractors expeditiously, properly and sufficiently performed their sub-contracts.

Thus, Davies testified that at the outset it was his duty "primarily to see to it that all the various trades * * * were provided with temporary lighting" (Appendix, pp. 8, 22); and that he was instructed "to blaze a trial for the Port Chester Electric Company * * * we were in virgin territory. It was virgin area, trees, no woods; I had surveyors under my supervision; and we staked out the pole line for the contractor" (Appendix, pp. 1-5).

He denied that it was his function to make detailed inspections of Port Chester's work (Appendix, pp. 11-12, 13, 16, 17-18, 24-25); according to him, that was the Army's function, the Army preparing "punch lists" specifying defects (Appendix, pp. 12-13, 21); his inspections were "casual", "to see to it the work was progressing in a very satisfactory manner" (Appendix, p. 15).

We respectfully submit that the sum total of Davies' testimony warranted no inference other than that he was discharging the right and obligation of the contractors to see to it that the sub-contractor was fulfilling its ultimate obligation. It is well settled under New York law that such supervision does not render the contractor liable for the sub-contractor's negligence.

Herman v. *City of Buffalo,* 214 N. Y. 316, 320;
Moore v. *Charles T. Wills, Inc.,* 250 N. Y. 426, 428;
Ahbol v. *Harden Contr. Co.,* 241 App. Div. 764, 270 Supp. 515, aff'd 265 N. Y. 564;
Rizzo v. *Murray,* 256 App. Div. 956, 10 Supp. 2d 92, aff'd 282 N. Y. 670.

In the *Herman* case, *supra,* the court said (p. 320):

> "* * * The fact that the owner through an architect and superintendent of construction or other agent exercises a general supervision of the work and construction does not affect the rule of exemption from liability, where that is only for the purpose of assur-

ance that the contract is being performed (Uppington v. City of New York, 165 N. Y. 222)."

But assuming, arguendo, that Davies' testimony may have warranted inferences that he did exercise control over the sub-contractor's work, or that he was so skilled a specialist that the contractors were thereby charged with the knowledge of such specialist, they were certainly not inferences which the testimony compelled to be drawn as matter of law, but were merely possible inferences, the choice of which was the function of the jury.

It is where only one inference may possibly be drawn that the court is authorized to withdraw determination thereof from the jury.

Bordonaro Theatres v. *Paramount Pictures,* 2 Cir. 176 F. 2d 594;
Staneck v. *Cole,* 7 Cir., 178 F. 2d 122, 125;
Louisville & N. R. Co. v. *Botts,* 8 Cir., 173 F. 2d 164, 166;
Stueber v. *Admiral Corp.,* 7 Cir., 171 F. 2d 777, 779;
Cf. Camardo v. *N. Y. State Railways,* 247 N. Y. 111, 118;
Foley v. *State,* 294 N. Y. 275, 280.

Since, therefore, the inferences to be drawn from Davies' testimony, both as to his qualifications and his function were, at most, permissive only, and hence, questions of fact, petitioners have been deprived of their constitutional right to a jury trial.

Tennant v. *Peoria & P. U. Ry. Co.,* 321 U. S. 29, 35;
Jacob v. *New York City,* 315 U. S. 752, 752, 757, 758;
Dimick v. *Schiedt,* 293 U. S. 474, 486;

Baylis v. *Travelers' Ins. Co.*, 113 U. S. 316, 320 and 321;
Hodges v. *Easton*, 106 U. S. 408, 410, 411 and 412;
F. W. Woolworth Co. v. *Carriker, et al.*, 8 Cir., 107 F. 2d 689, 694;
Cf. Imbrey v. *Prudential Ins. Co.*, 286 N. Y. 434;
Lowinthan v. *LeVine*, 299 N. Y. 372, 378.

It cannot be said that petitioners waived that right since the question was never in the case until presented by the opinion of the Court of Appeals.

It was not presented in the trial court, because, as we have shown, the trial judge did not submit the case to the jury on the basis that liability was dependent on the actual employment of an electrical engineer by defendants or any of them but on the basis that the standard of such a specialist was applicable to defendants and all of them, absolutely and in all events, as the Court of Appeals had said in its opinion on the prior appeal. Since, therefore, the fact of such employment was immaterial to the rule of liability as charged, defendants were not called upon to raise the question in the trial court.

Immediately after the question was brought into the case by the opinion below, petitioners promptly raised the constitutional point by their petition for rehearing (R., 637a).

POINT II

The Court of Appeals exceeded its jurisdiction in affirming the judgment on a theory different from that upon which it was submitted to the jury.

We have shown that the trial judge submitted the case on the theory that the standard to be applied was, unqualifiedly and absolutely, the skill of competent electrical engineers, irrespective of employment of any such engineer by defendants.

We have also shown that the Court of Appeals disposed of the appeal as against petitioners not on the correctness of that submission but on the different theory that such standard was applicable to petitioners because they had, in fact, employed an electrical engineer.

In ruling as it did, we submit that the Court of Appeals exceeded its appellate function, which was limited to review of the legal basis upon which the case was disposed of in the trial court.

The fact that the jury found against defendants on the absolute standard charged by the court would not justify the inference, implicit in the Court of Appeals decision, that they would have so found if the qualified theory of the Court of Appeals had been the basis of submission.

In affirming upon the new and unlitigated theory, we think the Court of Appeals abandoned its limited appellate function and undertook the unauthorized role of a trial court.

S. E. C. v. *Chenery Corp.*, 318 U. S. 80;
Hormel v. *Helvering*, 312 U. S. 552, 556;
McCaughn v. *R. E. L. & T. Co.*, 297 U. S. 606, 608;
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Baker v. *Kaiser*, 126 Fed. 317, 319.

An important question of appellate practice is therefore involved which should be reviewed by this court.

POINT III

The Complaint should have been dismissed for failure of proof.

We have heretofore pointed out (p. 6) that the Court of Appeals held that the evidence established that the jumper installed by the sub-contractor was not the jumper which allegedly caused the accident, but that there had been a substitution.

With regard to this, the Court of Appeals said that if the "departure from the original construction (of the jumper) added to the risk, there would be force in such an objection but there is no evidence that it did".

That such departure did add to the risk was undeniedly established by the testimony of expert Latzer in answer to questions of juror No. 10, as follows (R. 281a):

> "Juror No. 10: Is it mechanically possible for two Burndy connectors, such as installed on this pole, to become loose and cause the jumper to fall down?
>
> The Witness: Yes, it is mechanically possible if two Burndy connectors would be used, yes.
>
> Juror No. 10: Another question. It is less likely if only one Burndy connector were used and if the other end was a continuation of the main wire, then there would be less likelihood of its falling down?
>
> The Witness: Under those circumstances I can't imagine how it could fall."

So far as we are aware, this is the only testimony on the subject and affirmatively establishes that the risk was newly created or, at the very least, substantially increased.

If defendants' jumper could not have fallen, then it could not have caused the accident. Further, if it was

generally believed that it could not fall, then it was not patently dangerous because of possible contact with the strain plate, which was the sole basis upon which defendants were charged with liability.

Furthermore, there was no proof whatever that that original jumper was dangerous, because plaintiff offered no proof with regard to it. All of plaintiff's proof related to the substituted jumper consisting of a separate wire. There was no proof whatever that the continuous wire which was the original jumper was of such size or construction that even if it had dropped it could have touched the strain plate holding the guy wire.

In view of this failure of proof, and particularly in view of Latzer's testimony heretofore referred to, the complaint should have been dismissed and the verdict should have been set aside because there was no basis upon which the jury could properly have made the required finding that the original jumper was dangerous.

POINT IV

Under applicable local law, defendants were not liable because the danger was open and obvious.

On November 30th, 1950, the New York Court of Appeals in *Campo* v. *Scofield,* 301 N. Y. 468, held that the doctrine of dangerous instrumentalities, under which those responsible therefor may be held liable to remote users, has no application to such instrumentalities as are openly and obviously dangerous. The court there said that the manufacturer of a machine (p. 472):

> "* * * is under no duty to guard against injury from a patent peril or from a source manifestly dangerous."

That decision was rendered intermediate the verdict and the argument below, and was called to the attention of the Court of Appeals.

The Campo decision established, we submit, that the ruling of the Court of Appeals on the first appeal (176 Fed. 2d, 241) that defendants were subject to liability despite the fact that they had surrendered all control to the Army more than three (3) years before the accident, because of the inherent danger in the high tension wires and the jumper, was not in accord with local law.

Apparently, the Court of Appeals thought the Campo case applicable only on the question of contributory negligence for it said, in referring to that case (R., 627a):

> "There remains only the question of the decedent's contributory negligence which has two separate legal aspects."

The Campo case was not decided from the standpoint of contributory negligence. It was based on the sufficiency of the allegations of defendant's negligence. The court held that because the danger was obvious, no actionable negligence was or could be alleged.

So here, the danger from the jumper being obvious, no liability in negligence could be predicated upon it, at least as against a party not presently maintaining it, who had ceased all relation with it more than three (3) years before.

The ordinary rule is, of course, well settled that after a contractor has turned over the work to the owner and the owner assumes control, the contractor is not liable for subsequent accidents.

> *Ford* v. *Sturgis* (C. C. A., D. C.), 14 Fed. 2d 253;
> *City of New York* v. *Penn Steel Co.* (C. C. A. 2), 206 Fed. 454.

The burden was upon plaintiff to establish defendants' negligence, and she did not carry that burden under the Campo decision.

The writ of certiorari should therefore be granted.

Respectfully submitted,

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